UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/850*
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 850

Case No. 957: PATEL

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Meena Patel, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 December 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 18 December 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"[To order the production of certain documents]; and

B. To order the rescission of the Secretary-General's decision dated 10 June 1996 separating the Applicant for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3(a), with effect [from] 21 June 1996; and

C. To adjudge and declare that the Applicant has not been guilty of misconduct, but, at the most, of an error committed in good faith, at a time of severe stress due to compelling personal, professional and family circumstances; and

D. To order her retroactive reinstatement in the United Nations together with the restoration of her permanent appointment; or

E. Should the Secretary-General decide, in the interest of the UN, in accordance with article 9 of the Statute of the Tribunal, that the Applicant be compensated and not reinstated, to order payment to the Applicant of a

* Re-issued for technical reasons.

compensation equivalent to five years' net base salary at [the] D.1 grade, step IV for assignment in Bangkok, including restoration of pension and health insurance rights; ...

F. To order payment of $100,000 (one hundred thousand US dollars) as compensation for the material and professional injury sustained and its moral and financial consequences on the Applicant's professional career and personal life; ...

G. To order payment of three months' net base salary at [the] D.1 grade in Bangkok as compensation for the failure to afford the Applicant due process detailed below; and

H. To order reimbursement of all legal costs incurred in relation to the present complaint, and

I. To order payment of interest at 6% to [the] Applicant on all sums hereunder from 1 June 1996."

Whereas the Respondent filed his answer on 13 May 1997;

Whereas, on 4 June 1997, the Applicant filed written observations;

Whereas, on 21 October and 2 November 1997, the Applicant filed additional comments with the Tribunal;

Whereas, on 7 November 1997, the Tribunal requested the Respondent to provide it with additional information, which he did, on 11 November 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Economic and Social Commission for Western Asia (ESCWA) on 7 July 1977, as a Transnational Corporations Affairs Officer, at the P-3, step I level, in Beirut, Lebanon, on a three month, fixed-term appointment, which was successively extended. On 1 April 1981, the Applicant was promoted to the P-4 level. On 1 July 1982, she was reassigned to ESCWA, Baghdad, Iraq. On 1 November 1982, she was given a probationary appointment. On 17 June 1983, she was transferred to the Economic and Social Commission for Asia and the Pacific (ESCAP) in Bangkok, Thailand, as an Economic Affairs Officer in ESCAP's

Development Planning Division. On 1 August 1983, the Applicant was given a permanent appointment. On 1 February 1988, she was given the functional title of Social Affairs Officer in ESCAP's Social Development Division. On 1 August 1988, the Applicant was promoted to the P-5 level. On 17 January 1994, she was appointed Officer-in-Charge of the Rural and Urban Development Division of ESCAP. On 1 November 1994, the Applicant was promoted to the D-1 level. On 21 June 1996, the Applicant was separated from service for misconduct.

On 30 September 1994, the Applicant submitted a Status Report and Request for Payment of Dependency Benefits form for the years 1992 and 1993, together with a "TO WHOM IT MAY CONCERN STATEMENT", dated 28 April 1994, from the Asian Institute of Technology (AIT), indicating that her husband had gross earnings of Baht 707,610 for the calendar year 1993.

On 11 November 1994, the Chief of the ESCAP Personnel Services Section acknowledged receipt of the form and advised the Applicant that her husband's earnings for 1993 exceeded the ceiling established for the payment of a dependency allowance. He explained that recovery of the amounts previously paid to the Applicant as a dependency allowance would start for the year 1993. He further asked the Applicant to supply information on her husband's earnings for 1992.

On 10 January 1995, the Chief, Personnel Services Section, wrote to the Applicant, reiterating the request for a statement of her husband's earnings for 1992. In a reply delivered to the Personnel Services Section on 12 January 1995, the Applicant submitted a statement from the AIT, dated 8 November 1994, in response to that request.

On 23 January 1995, the Chief of the ESCAP Personnel Section asked the Applicant to "clarify and confirm" the figures in that statement. In a response dated 27 January 1995, the Applicant sent a routing slip to the Chief, Personnel Services Section, stating, inter alia, "This is to confirm that the gross earnings of [the Applicant's husband] is Baht 601,576.00 from January to December

1992". The Applicant also sent another copy of the 8 November 1994 statement with the notation thereon over her signature: "The current year's figure (1992) should read B 601,576".

On 2 February 1995, the Acting Executive Secretary wrote to the Assistant Secretary-General for Human Resources Management (OHRM) pursuant to ST/AI/371, stating that the Applicant appeared to have altered the attestation of annual earnings in respect of her husband for the year 1992. The effect of the alteration was to reduce the total earnings of the Applicant's husband to an amount less than the established earnings limit for the year, thus qualifying the Applicant for payment of the dependency allowance in respect of her husband.

On 22 March 1995, the Acting Executive Secretary wrote to the Applicant, informing her of allegations of misconduct against her; in particular, the Applicant was charged with having altered the AIT Statement from BAHT 681,576 to BAHT 601,576. On 7 April 1997, the Applicant advised the Deputy Executive Secretary of ESCAP that "when I received the certificate of evidence dated 8 November 1994, I noticed that the expiry date of current contract was March 1977, which was wrong. As the matter was two years old and urgent, I immediately telephoned the AIT office and I read out what was certified and I was told that the expiry date should be March 1997 and the amount of the earnings should be B601,576. That is why when I was requested by Personnel, I confidently certified that figure was correct."

On 10 April 1995, the Applicant resigned for "family reasons". On 17 April 1995, she asked that other options less drastic than resigning be considered, such as compassionate leave so that she could be with her daughter, who had been the victim of an accident. She was permitted to withdraw the resignation.

On 18 April 1995, the Applicant wrote to the Deputy Executive Secretary, as follows:

"Since November 1991 I have suffered a tragedy and several setbacks in my personal life, which I am unable to put down on paper, and about which the Administration is only partly aware ... I have gone from one crisis situation to another, and have tried to deal with it as best as I could, but was unable to seek advice or help from anyone. I can talk about that in person to anyone from the Administration.

As I think about my action, I realize that I was completely out of my senses, as I did not even think that what I did would be considered as a crime."

On 7 May 1995, the Applicant wrote to the Deputy Executive Secretary, noting that:

"As I have explained in my memo of 7 April, when I received the 1992 certification, I noticed that the date of expiry of the contract was wrong. When I contacted AIT, I was informed not only about the date but also about the total earnings. While still married but estranged, I am not sure whether I was duped into changing the figure or I heard the figure wrong. Whatever it was, [with] hindsight, I do feel that I could have easily avoided committing such an irregular act by simply requesting ... another certificate. However, ... [m]y anguished state of mind must have weakened my judgement.

As I had not doubted that the correct figure was Baht 601,576, when the Personnel Section approached me to verify the figure I readily did so."

On 12 October 1995, the Assistant-Secretary General for OHRM wrote to the Chairperson of the Joint Disciplinary Committee (JDC), referring the Applicant's case to that body. The JDC adopted its report on 5 April 1996. Its conclusions and recommendations read, in part, as follows:

"15. The Committee noted that the problem started through negligence of the staff member in failing to complete the form for her spouse's 1992 earnings. This contributed to the sense of urgency when the required information actually did arrive from the employer.

...

17. Taken along with the certificate already submitted for 1993 earnings (...), the Committee was not convinced of the need for the staff member to have called anyone on receipt of the 1992 certificate. The error on the certificate regarding the contract expiry date was an egregious one, contradicted within the form itself, and not material to the determination of the dependency limits. Indeed, the certificate finally utilized to determine dependency status still contained the error.

18. The Committee took the view that the manner in which the certificate had been altered was significant. Although 'blatant' in a certain sense, an attempt had been made to make it look 'official', and the Committee gathered that if PSS [Personnel Services Section] had been less vigilant, it might have passed muster. The Committee agreed with the staff member's contention that, in retrospect, it would have been better to have obtained a new certificate altogether. It noted, however, that to have done so, if there was intention to defraud, would not have served the staff member's purpose.

19. The staff member and her counsel averred that the staff member's repeated confirmation of the lower incorrect figure proved that there had been no male fide intention. In fact, the Committee felt that PSS' two requests for clarification gave the staff member the opportunity to rethink the situation and rectify it - but she chose not to. The Committee realized that once the staff member's attention had been drawn to the falsified document, she was in a difficult position; she had either to maintain her position, which she did, or admit to having knowingly submitted a document with changes to what proved to be the correct figure.

20. All in all, the Committee felt that the onus of proof that the false certification was not done with intent to defraud, rested with the staff member. The Committee was not convinced, taking the above points into account, that the staff member had demonstrated a lack of male fide intention. In a certain sense, the staff member's actions were consistent with an intention to defraud: failure to submit the required information in the first instance, reported questioning of an apparently valid certificate, carefully changing the certificate in a manner that, had it passed unnoticed, would have brought her material gain, persisting in that contention when queried, and providing inconsistent evidence on the crucial matter of the identity of the AIT employee to whom she spoke.

21. The Committee therefore concluded that the charges brought against the staff member, namely,

a) false certification;
b) forgery;
c) attempted fraud; and
d) misrepresentation

were substantiated. The facts as established would constitute a violation of her obligations under staff regulation 1.4, which requires staff members to conduct themselves at all times in a manner befitting their status as international civil servants, and a violation of the standards of integrity expected of all international civil servants.

V. Recommendations

22 Having considered the case most carefully, and given the nature of the offence, the Committee would have recommended demotion as an appropriate disciplinary measure in the absence of any mitigating circumstances. However, based on information which had been provided in the staff member's submissions, the Committee recognized that there were mitigating circumstances in the present case. The Committee was deeply sympathetic to the staff member's situation although it was not able to determine the exact extent to which these circumstances, in particular their time frame in relation to the incidents under investigation, might have affected her judgement and actions (nor did it feel it appropriate to probe further into those circumstances). In view of the mitigating circumstances and the staff member's 18 years of satisfactory service, the Committee recommends that the Secretary-General take the following disciplinary measures against the staff member:

a) letter of censure to be placed in the staff member's official file;

b) loss of steps within grade - reversion to step I;

c) suspension without pay for three months.

The Committee also recommends that the staff member's certifying officer functions be withdrawn for a period of two years."

On 10 June 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Committee's report. He has accepted the Committee's conclusion that the charges brought against you of false certification, forgery, attempted fraud and misrepresentation in connection with your submission of an altered document in support of a request for payment of dependency benefits for the year 1992 were substantiated. He is also in agreement with the conclusion of the Committee that your conduct constituted a violation of your obligations under staff regulation 1.4, which requires staff members to conduct themselves at all times in a manner befitting their status as international civil servants, and a violation of the standards of integrity expected of all international civil servants.
>
> The Secretary-General has given careful consideration to the Committee's recognition of mitigating circumstances in your case and to your 18 years of satisfactory service. He has also given consideration to the seriousness of your actions in the light of your position as a senior official in the Organization, especially one with certifying authority. Considering all of the circumstances, the Secretary-General has concluded that your conduct constituted a serious violation of the UN standards of conduct and integrity expected of each staff member of the Organization and that this misconduct is incompatible with continued service with the Organization.
>
> In the light of this conclusion, the Secretary-General cannot accept the Committee's recommendation regarding disciplinary measures. Pursuant to his discretionary authority to impose an appropriate disciplinary measure for misconduct, the Secretary-General has decided to separate you from service with compensation in lieu of notice under staff regulation 10.2, paragraph 1 and staff rule 110.3(a)(vii) with effect from the date you receive this letter. The Secretary-General has also decided that, given the nature of the offence, no indemnity will be paid under Annex III(c)."

On 18 December 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JDC committed two procedural errors, which are uncontested by the Respondent and which amount to a denial of the high standard of due process to which the Applicant was entitled.

2. The extreme sanction imposed by the Organization from its Headquarters in New York was neither proportional nor appropriate to the actions of the Applicant and, further, did not conform to the findings or recommendations of those at the duty station.

Whereas the Respondent's principal contentions are:

1. Staff who obtain allowances or benefits on the basis of certification that proper information is supplied are responsible to ensure that such information is correct.

2. Disciplinary action is not criminal in nature. Once prima facie evidence of misconduct is established, the staff member has the onus to rebut it.

The Tribunal, having deliberated from 6 to 26 November 1997, now pronounces the following judgement:

I. The Applicant is appealing a decision of the Secretary-General not to accept the recommendations of the Ad hoc Joint Disciplinary Committee (JDC) but to separate her from service due to misconduct. In addition, her pleas to the Tribunal include, as a preliminary measure, that the Tribunal order the Respondent to communicate to the Applicant the "broad guidelines on sanctions applicable in cases of misconduct" as well as other information.

II. Regarding the Applicant's plea for this preliminary measure, the Tribunal recognizes the Respondent's admission that the Applicant was not provided with the "broad guidelines on sanctions

applicable in cases of misconduct" which the Administration had furnished to the JDC. The Respondent also admits that when the Chief, Personnel Services Section, provided additional clarification on the case, neither the Applicant nor her counsel were present and that two witnesses gave testimony in the presence of each other. The Tribunal notes that the charge of misconduct due to fraud against the Applicant is severe and therefore the Administration must be scrupulous in its respect for the requirements of due process. Having reviewed the case, the Tribunal takes note of the Respondent's admission that certain procedural errors were committed.

III. Paragraph 17 of administrative instruction ST/AI/371 dated 2 August 1991, states:

> "If the Committee [the JDC] decides to hear oral testimony, both parties and counsel should be invited to be present, and no witnesses should be present during the testimony of other witnesses."

The JDC did not respect this provision. The Tribunal finds that although the JDC committed procedural errors, these errors were technical in nature and did not affect the substance of the Applicant's case so as to result in a miscarriage of justice (Judgement No. 583, Djimbaye (1992)). Nonetheless, the Tribunal wishes to emphasize that especially in a difficult case such as this one, the Administration must take care to ensure that all procedural requirements are scrupulously respected.

IV. On the substance of her claim, the Applicant submits that the Administration's charges against her had not been proven beyond a doubt and that they should therefore be dismissed. The Tribunal rejects this argument. Under the Staff Regulations and Rules, disciplinary proceedings are administrative proceedings regulated by

the internal law of the Organization. Once a prima facie case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question (Judgements No. 484, Omosola (1990) and No. 592, Dey (1991)).

V. The Tribunal notes that it is incumbent upon the staff member who obtains allowances or benefits from the Administration, on the basis of his or her certification, to ensure that proper information is supplied. The Applicant submitted a certificate for dependency benefits on which she indicated that "I certify that the information provided in this form, as well as the supporting evidence submitted with it, is true and complete to the best of my knowledge and belief." Since the certification was incorrect, the Applicant had the onus of proof to convince the Secretary-General that, in submitting the certificate, she had not acted contrary to the highest standards of integrity, as mandated by the United Nations Charter. In order for the Applicant to prevail, it is not sufficient for her to claim good faith based on trusting another's representation (Cf. Judgement No. 424, Ying (1988)). The Applicant has produced evidence showing that her conduct was, or may have been, attributed to the dire personal circumstances in which she found herself at the time of her misconduct. The JDC's consideration of these facts led it to find that they constituted mitigating circumstances. Consequently, the JDC recommended that the Applicant be suspended without pay for three months, that she lose all steps within her grade above step I, and that a letter of censure be placed in her personnel file.

VI. It is within the Secretary-General's discretion, however, to determine whether a staff member has met the standards of conduct required by the Charter and the Staff Regulations and Rules. (Cf. Judgements No. 424, Ying (1988); No. 425, Bruzual (1988 and No. 479, Caine (1990)). It is clear that the Secretary-General, in

his determination, must act without prejudice or other extraneous considerations and with respect for the requirements of due process (Cf. Judgements No. 436, Wiedl (1988) and No. 641, Farid (1994)). Taking into account the technical procedural errors previously discussed, the Tribunal considers that, however harsh the result may be for the Applicant, the Secretary-General was within his discretionary authority in determining that the Applicant's alteration of the AIT certificate constituted misconduct, which should result in the sanction applied.

VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary